IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7203 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ROHITKUMAR BHAVANISHANKER DAVE

Versus

JAYSHANKER CHHOTASHANKER DAVE SINCE DIED THRO.LEGAL HEIRS

Appearance:

1. Special Civil Application No. 7203 of 2002

MR NK MAJMUDAR for Petitioner No. 1-4

..... for Respondent No. 1

MS MEGHA JANI for Respondent No. 1/1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 27/12/2002

ORAL JUDGEMENT

Heard learned advocate Mr. N.K. Majmudar for the petitioner and Ms.Meghaben Jani, learned advocate for the respondent. In this petition under Article 227 of the Constitution of India, the petitioner has challenged the order dated 5th July,2002 passed by the learned Civil Judge,J.D., Savli below Exh. 26 in RCS NO. 48 of 1988. It was submitted by the learned advocate Mr. Majmudar on behalf of the petitioner that the Court below has committed gross jurisdictional error in deciding the matter as if he has been deciding the suit itself finally. He also submitted that the observations made in the said order at page 43 that the petitioner has failed to prove that he is the tenant under the Tenancy Act amounts to virtually allowing the suit against the present petitioner. He also submitted that on one hand, the court below is not framing the issue and rejecting the application Exh. 26 and on the other hand, the court below is giving contradictory findings which are perverse and, therefore, interference of this court is necessary. He also submitted that the court below has deviated from the well settled principles of law. He also submitted that the court below cannot assume the jurisdiction of the Mamlatdar and, therefore, the order passed below Exh. 26 in the aforesaid suit is suffering from the vice of gross error and, therefore, interference of this court is necessary.

Learned advocate Ms. Jani appearing for the respondent has submitted that the court below has considered application Exh. 26 filed by the petitioner original defendant under Order 14 of the Code of Civil Procedure for recasting of the issues. She further submitted that earlier also, the present petitioner original defendant had filed one suit being civil suit no. 17 of 1988 wherein same question was raised by the present petitioner and, therefore, ultimately, in that suit, plaint was returned to the petitioner and, thereafter, no process has been initiated by the petitioner before the revenue authorities under the provisions of the Tenancy Act. It was also submitted by her that the court below has considered the documents, Sanad Mark 3/10 and has come to the conclusion that the original plaintiff and defendant both are co-owners. These being the prima facie observations, according to her, cannot be considered to be deciding the suit itself finally. Therefore, it was submitted by her that the civil court has not committed any error in respect of jurisdiction; the findings given by the civil court are not perverse because the civil court has considered the documents on record, facts and circumstances of the case and, thereafter, has given such findings in the impugned

order dated 5th July, 2002 and, therefore, the order impugned herein is legal and valid order and, therefore, no interference is necessary.

While this Court was dictating this order in the open court, after the submissions made by the learned advocate Mr. Majmudar on behalf of the petitioner as well as Ms. Jani on behalf of the respondent were recorded by this Court, in the midst of the order, learned advocate Mr.Majmudar has submitted that he is relying upon one decision of this court in case of Gandabhai Jinabhai versus Ramubhai Fakir reported in 1982 GLH page 17. It was also submitted by him that as per section 70(b), 85 and 85(a) of the Tenancy Act, there is bar of jurisdiction of the civil court and the question as to whether the particular person is tenant or not is exclusively required to be determined by the Tenancy Court. I have considered the decision cited by Mr. Majmudar. The decision cited by Mr. Majmudar is, in respect of his submissions, having contradictory effect to his own submissions. If the civil court is not having jurisdiction to decide whether the particular person is a tenant or not under the Tenancy Act, then where is a question to apply before the civil court by the defendant by giving separate application at Exh. 26 for framing of the issue as to whether the defendant is a tenant or not. It is a settled law which has been referred to and relied upon by Mr. Majmudar that the question of tenancy or tenant cannot be examined by the civil court and there is a clear bar under the provision of the Bombay Tenancy Act and, therefore, when the civil court has come to the conclusion that there is no prima facie case proved by the tenant that he is the tenant in respect of the land in question, then, there is no need to frame issue to that effect as to whether the defendant is a tenant or not. The Civil Court has considered one aspect that earlier also, same question was raised by the defendant who is the present petitioner in a suit being Civil Suit No. 17 of 1988 filed by the petitioner and ultimately, plaint in the said suit has been returned to the present petitioner for presentation thereof before the appropriate forum. It was thereafter observed by the civil court that no effective steps were thereafter taken by the petitioner before the revenue authority in that regard by filing necessary application for determination of the issue as to whether the present petitioner is a tenant or not under the Bombay Tenancy Act. The petitioner thereafter remained silent from 1988 for about fourteen years and, thereafter, in the pending suit of the plaintiff, the present petitioner filed the application Exh. 26 for framing of the issue as to

whether the present petitioner - original defendant is the tenant or not, which is, in the opinion of this court, nothing but the delay tactics adopted by the present petitioner by giving separate application Exh. 26 in the suit of the respondent original plaintiff pending since 1988 and, therefore, considering this fact, when the petitioner has not been able to show even prima facie case by producing any documentary evidence or piece of evidence that he was the tenant in the land in question, in such circumstances, the civil court was right in observing that the defendant has failed to prove prima facie case that he was the tenant in respect of the land in question. There is no final determination of the issue by the civil court while observing the said case. Therefore, considering the said fact, when the present petitioner has not taken effective steps for getting the issue determined after the plaint was returned to the present petitioner in the earlier suit in the year 1988 in civil suit no. 17 of 1988 and considering the documents Exh. 3/10 produced by the present respondent original plaintiff, the present petitioner and the respondent are the co-owners in respect of the land in question and the co-owners cannot claim the tenancy rights against each other is the view taken by this court in the matter of SHRIMATI AMTHIBEN w/o JESANGJI NATHUBHAI VERSUS PATEN SHANKERBHAI PARSHOTTAMDAS reported in 24(1) GLR 170. In the said decision, this court has considered section 4 of the Tenancy Act and has ultimately come to the conclusion that the tenant of the land in question though he happened to be the uncle in law of the petitioner land lady, it must be held that since the respondent is related, he must be held tobe a member and therefore beyond the purview of the benefit of deemed tenant under the Tenancy Act prescribed under section 4 of the Act. Similarly, the civil court has also observed at page 41 that the plaintiff and the defendant, both are family members and, therefore, they cannot claim tenancy right against each other under section 4 of the Tenancy Act. The decision in case of SHRIMATI AMTHIBEN w/o JESANGJI NATHUBHAI VERSUS PATEN SHANKERBHAI PARSHOTTAMDAS reported in 24(1) GLR 170 has been considered by the civil court and on that basis, the findings have been given by the civil court and, therefore, according to my opinion, the civil court has not committed any error while passing the impugned order dated 5th July, 2002. On the contrary, the civil court has applied mind in respect of the question raised by the defendant before it and ultimately, as per my view, the civil court has rightly come to the conclusion that the original plaintiff and the defendant both are family members and as such, cannot claim tenancy right as per

the decision in case of SHRIMATI AMTHIBEN w/o JESANGJI NATHUBHAI VERSUS PATEN SHANKERBHAI PARSHOTTAMDAS reported in 24(1) GLR 170. In view of that, according to my opinion, the submissions made by Mr. N.K. Majmudar, learned advocate for the petitioner original defendant that the civil court has committed gross error cannot be accepted. Therefore, in view of the facts of the present case and also in view of the aforesaid decisions of the apex court, there is no substance in the contentions raised by Mr. Majmudar on behalf of the petitioner. Therefore, there is no substance in this petition and the same is required to be dismissed.

Further, the petitioner is challenging the order passed by the civil court in a petition under Article 227 of the Constitution of India in view of the amendment in section 115 the Code of Civil Procedure. This Court is having very limited jurisdiction under Article 226 and/or 227 of the Constitution of India. It is settled position of law that the powers of this Court are very limited while examining the legality and validity of the order passed by the court below in view of the decision of the Apex Court in Indian Overseas Bank v. I.O.B. Staff Canteen Workers' Union and Another reported in 2000 SCC [Labour and Service] pg.471, wherein the Apex Court has held that while exercising the powers under Article 226 and 227 of the Constitution, interference with pure finding of fact and Reappreciation of the evidence is held to be impermissible unless the findings of the court below are perverse or without jurisdiction. The High Court does not exercise appellate jurisdiction under Article 226 and/or 227 of the Constitution of India. Recently also, the Apex Court has considered this aspect in case of SUGARBAI M. SIDDIQ AND OTHERS V. RAMESH S. HANKARE reported in 2001 [8] SCC pg.477. Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution of India in case of OUSEPH MATHAI AND OTHER V. M. ABDUL KHADIR reported in 2002 [1] SCC 319. Recently also, the Apex Court has considered the scope of Article 226 and 227 of the Constitution in case of ROSHAN DEEN VS. PREETILAL reported in [2002] 1 SCC Pg.100.

Recently, the apex court has considered the scope of Article 227 of the Constitution of India in case of ESSEN DEINKI VERSUS RAJIV KUMAR reported in (2002) 8 SCC page 400. Relevant observations made by the apex court in para 2 and 3 of the said decision are reproduced as under:

"2. Generally speaking, exercise of

jurisdiction under Article 227 of the Constitution is limited and restrictive in nature. It is so exercised in the normal circumstances for want of jurisdiction, errors of law, perverse findings and gross violation of natural justice, to name a few. It is merely a revisional jurisdiction and does not confer an unlimited authority or prerogative to correct all orders or even wrong decisions made within the limits of the jurisdiction of the courts below. The finding of fact being within the domain of the inferior tribunal, except where it is a perverse recording thereof or not based on any material whatsoever resulting in manifest injustice, interference under the Article is not called for.

3. The observations above, however, find affirmative in the decision of this Court in Nibaran Chandra Bag v. Mahendra Nath Ghughu [AIR 1963 SC 1895]. In Nibaran, this Court has been rather categorical in recording that the jurisdiction so conferred is by no means appellate in nature for correcting errors in the decision of the subordinate courts or tribunals but is merely a power of superintendence to be used to keep them within the bounds of their authority. More recently, in Mani Nariman Daruwala v. Phiroz N. Bhatena [(1991) 3 SCC 141:AIR 1991 SC 1494], this court in a similar vein stated : (SCC pp.149-50, para 18)

'In the exercise of this jurisdiction the High Court can set aside or ignore the findings of fact of an inferior court or tribunal if there was no evidence to justify such a conclusion and if no reasonable person could possibly have come to the conclusion which the court or tribunal who (sic) has come or in other words it is a finding which was perverse in law. Except to the limited extent indicated above, the High Court has no jurisdiction to interfere with the findings of fact.'"

Therefore, in view of the above, there is no substance in any of the contentions raised by the learned advocate Mr. Majmudar on behalf of the petitioner. The order passed by the court below is just and proper and supported by cogent and convincing reasons. Therefore,

this petition is required to be dismissed.

In the result, this petition is dismissed. Notice is discharged. Interim relief, if any, shall stand vacated. There shall be no order as to costs.

Dt.27.12.2002. (H.K. Rathod,J.)
Vyas